

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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JOHN RESTIVO, DENNIS HALSTEAD, MELISSA  
LULLO, JASON HALSTEAD, and TAYLOR HALSTEAD,

Plaintiffs,

v.

NASSAU COUNTY, JOSEPH VOLPE, in his individual capacity, ROBERT DEMPSEY, in his individual capacity, FRANK SIRIANNI, in his individual capacity, MILTON GRUBER, in his individual capacity, HARRY WALTMAN, in his individual capacity, ALBERT MARTINO, in his individual capacity, CHARLIE FRAAS, in his individual capacity, THOMAS ALLEN, in his individual capacity, RICHARD BRUSA, in his individual capacity, VINCENT DONNELLY, in his individual capacity, MICHAEL CONNAUGHTON, in his individual capacity, WAYNE BIRDSALL, in his individual capacity, WILLIAM DIEHL, in his individual capacity, JACK SHARKEY, in his individual capacity, DANIEL PERRINO, in his individual capacity, ANTHONY KOZIER, in his individual capacity, DETECTIVE SERGEANT CAMPBELL (SHIELD #48), in his individual capacity, ROBERT EDWARDS, in his individual capacity, SEAN SPILLANE, in his individual capacity, JOHN DOE OFFICERS AND DETECTIVES #1-10, in their individual capacities, and RICHARD ROE SUPERVISORS #1-10, in their individual capacities,

Defendants.

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JOHN KOGUT,

Plaintiff,

v.

The COUNTY of NASSAU, Police Commissioner  
DONALD KANE, Police Commissioner WILLIAM J.  
WILLETT (2005), Police Commissioner JAMES

**No. CV-06-6720**

(Seybert, J.)

(Wall, M.J.)

**No. CV-06-6695**

(Seybert, J.)

(Wall, M.J.)

LAWRENCE, Detective SEAN SPILLANE (Head of Homicide 1985), Detective DENNIS FARRELL (Head of Homicide 2005), Detective JOSEPH VOLPE, Detective ROBERT DEMPSEY, Detective ALBERT MARTINO, Detective WAYNE BIRDSALL, Detective MILTON G. GRUBER, Detective CHARLES FRAAS, Detective FRANK SIRIANNI, Detective HENRY WALTMAN, P.O. MICHAEL CONNAUGHTON, P.O. WILLIAM DIEHL and JOHN DOES 1-5,

Defendants,

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**PLAINTIFFS' FIRST REQUEST FOR ADMISSION PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE 36**

Plaintiffs, by counsel, pursuant to Rule 36 of the Federal Rules of Civil Procedure, hereby serve the following request for admission upon defendants. The requested admissions shall be deemed admitted unless, within 30 days of service, you serve a signed, written answer or objection. If you object, you must indicate all the reasons for your objection. Your answer shall admit, specifically deny the matter, or set forth in detail all the reasons why you cannot truthfully admit or deny the matter. When good faith requires that you qualify an answer or deny only a part of the matter of which an admission is requested, you shall admit so much of it as is true and qualify or deny the remainder. You may not give lack of information or knowledge as a reason for failure to admit or deny unless you have made reasonable inquiry and the information known or readily obtainable by you is insufficient to enable you to admit or deny. In that event, you must describe the full extent of your inquiry. You may not object to a request on the grounds that you believe it presents a genuine issue for trial. In the event that you fail to admit a matter without reasonable grounds, plaintiffs reserve the right to petition the court to deem the matter admitted and seek reimbursement of expenses incurred in connection with the motion.

### REQUESTS FOR ADMISSION

1. On December 6, 1984, Robert Baumann, a serologist in the Nassau County Medical Examiner's Office, obtained three vaginal swabs, two anal swabs, and two oral swabs from the body of Theresa Fusco and created two vaginal smears, three anal smears, and three oral smears from those specimens.<sup>1</sup>
2. Baumann determined that the vaginal smears and swabs were positive for the presence of spermatozoa.<sup>2</sup>
3. Baumann determined that the anal and oral smears and swabs were negative for the presence of spermatozoa.<sup>3</sup>
4. On September 20, 1994, CBR Laboratories received a package via Federal Express from Bruce E. Whitney of the Nassau County District Attorney's Office that contained an oral swab (CBRL Item # 13553), two vaginal swabs (CBRL Item # 13554), and a slide (CBRL Item # 13555) containing specimens obtained from Theresa Fusco's body on December 6, 1984.<sup>4</sup>
5. On November 29, 1994, David H. Bing, Ph. D., Scientific Director of CBR Laboratories, reported that Theresa Fusco "cannot be excluded as the donor of the DNA extracted from the epithelial cell lysate of CBRL items 13554 and 13555."<sup>5</sup>

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<sup>1</sup> Ex. A, Office of Medical Examiner, County of Nassau, Serology Laboratory, Analysis Report dated Jan. 3, 1985 (Bates No. TR240-41.)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Ex. B, CBR Laboratories Report of Nov. 29, 1994 (Bates No. TR840-42.)

<sup>5</sup> *Id.* at TR841.

6. Dr. Bing reported that “the DNA in [the male lysate of CBRL item 13555] was a mixture of two or more individuals.”<sup>6</sup>
7. Dr. Bing concluded that Dennis Halstead, John Kogut, and John Restivo can be excluded as the donor of the DNA extracted from the epithelial cell lysate and male lysate of CBRL items 13553, 13554, and 13555.<sup>7</sup>
8. As of November 29, 1994, Dennis Halstead, John Kogut, and John Restivo were conclusively excluded as sources of the unknown male DNA found on the oral swab, vaginal swab, and slide taken from Theresa Fusco’s body on December 6, 1984.
9. Exhibit B is an authentic, true and correct copy of the CBR Laboratories report of November 29, 1994.
10. On December 6, 1994, Cellmark Diagnostics received one vaginal swab, two vaginal smears, one swabbing from a tube, and one oral swab taken from Theresa Fusco’s body on December 6, 1984.<sup>8</sup>
11. In a report dated January 5, 1995, Cellmark scientists Robin W. Cotton and Paula J. Yates stated that no conclusion could be made regarding the sperm fraction of the vaginal swab, the sperm fraction of the swabbing from the tube, and the non-sperm cell fraction of the vaginal swab.<sup>9</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at TR842.

<sup>8</sup> Ex. C, Cellmark Diagnostics Report of January 5, 1995 (Bates No. TR1272–74).

<sup>9</sup> *Id.*

12. The Cellmark scientists reported that Theresa Fusco “cannot be excluded as either the source of the DNA obtained from the non-sperm cell fraction of the combined vaginal smears or from the non-sperm cell fraction of the swabbing from the tube.”<sup>10</sup>
13. The Cellmark scientists determined that “John Restivo, John Kogut, and Dennis Halstead are excluded as sources of the DNA obtained from the non-sperm cell fraction of the combined vaginal smears and from the non-sperm cell fraction of the swabbing from the tube.”<sup>11</sup>
14. The Cellmark scientists determined that “DNA from at least two individuals was obtained from the sperm fraction of the combined vaginal smears. [Theresa Fusco] cannot be excluded as one of the sources of this DNA. John Restivo, John Kogut and Dennis Halstead are excluded as sources of the DNA obtained from the sperm fraction of the combined vaginal smears.”<sup>12</sup>
15. The January 5, 1995 Cellmark report establishes to a scientific certainty that Dennis Halstead, John Kogut, and John Restivo were excluded as sources of the unknown male DNA found on the vaginal smears taken from Theresa Fusco’s body on December 6, 1984.
16. Exhibit C is an authentic, true and correct copy of the Cellmark Diagnostics report of January 5, 1995.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

17. On March 9, 2001, LabCorp received one sealed bag containing “Item 5,” a tube with extracted DNA labeled ‘1416 02E2’ and listed as sperm fraction from vaginal smear, which was taken from Theresa Fusco’s body on December 6, 1984.<sup>13</sup>
18. LabCorp scientists Shawn M. Weiss and Meghan E. Clement concluded that “[t]he DNA profile obtained from 02E2-sperm fraction of the vaginal smear (Item 5) is consistent with a mixture of DNA from more than one individual. The major profile is consistent with a male contributor.”<sup>14</sup>
19. Exhibit D is an authentic, true and correct copy of the LabCorp report of March 20, 2001.
20. The Department of Forensic Biology in the Office of the Chief Medical Examiner of the City of New York compared the DNA profile of the sperm fraction of the vaginal smear tested by LabCorp to the DNA profiles of John Restivo, Dennis Halstead, and John Kogut and, as reflected in a reported dated December 4, 2001, concluded that “John Restivo, Den[n]is Halstead, and John Kogut could not have contributed the DNA alleles seen in the sperm fraction of the vaginal smear ‘listed as from T[h]eresa Fusco’.”<sup>15</sup>
21. Exhibit E is an authentic, true and correct copy of the Medical Examiner’s report of December 4, 2001.
22. Consistent with the results obtained by Cellmark in 1995, the LabCorp report of March 9, 2001 and the Medical Examiner report of December 4, 2001 establishes to a scientific certainty that Dennis Halstead, John Kogut, and John Restivo were excluded as sources

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<sup>13</sup> Ex. D, LabCorp Report of March 20, 2001 (Bates No. IP1715–16).

<sup>14</sup> *Id.*

<sup>15</sup> Ex. E, New York City Medical Examiner’s Report of December 4, 2001 (Bates No. CM4796–99).

of the unknown male DNA found on the vaginal smears taken from Theresa Fusco's body on December 6, 1984.

23. In January 2003, the previously untested third vaginal swab taken from Theresa Fusco's body on December 6, 1984 was discovered during a review of the evidence in the NCPD Property Bureau.<sup>16</sup>
24. On March 18, 2003, Orchid Cellmark received the newly-discovered vaginal swab, along with the oral and anal swabs and smears obtained from Theresa Fusco's body on December 6, 1984.<sup>17</sup>
25. As reflected in their report of March 31, 2003, Orchid Cellmark scientists Charlotte J. Word, Ph. D., and Jason K. Befus conducted DNA testing on the newly-discovered vaginal swab and concluded that "DNA from more than one individual was obtained from the non-sperm fraction of the vaginal swab. The primary DNA profile from this sample matches the DNA profile obtained from T[h]eresa Fusco. John Restivo, Dennis Halstead, and John Kogut are excluded as source of the DNA obtained from this sample" and that "[t]he DNA obtained from the sperm fraction of the vaginal swab is from a male. T[h]eresa Fusco, John Restivo, Den[n]is Halstead, and John Kogut are excluded as sources of the DNA obtained from this sample."<sup>18</sup>
26. Exhibit F is an authentic, true and correct copy of the Orchid Cellmark report of March 31, 2003.

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<sup>16</sup> Ex. F, Correspondence from Pavlides to Morrison dated Jan. 16, 2003 (Bates No. B09514).

<sup>17</sup> Ex. G, Orchid Cellmark Report of March 31, 2003 (Bates No. CM4802-06).

<sup>18</sup> *Id.*

27. The DNA test results of the Medical Examiner's Office and Orchid Cellmark establish to a scientific certainty that Dennis Halstead, John Kogut, and John Restivo are excluded as the source of the semen recovered from Theresa Fusco's body on December 6, 1984.
28. Based on the 2001 and 2003 DNA test results excluding Dennis Halstead, John Kogut, and John Restivo as the source of the semen recovered from the body of Theresa Fusco, on May 27, 2003, the Nassau County District Attorneys' Office and counsel for Halstead, Kogut, and Restivo filed a joint motion to vacate the convictions of Halstead, Kogut, and Restivo for the rape and murder of Theresa Fusco.<sup>19</sup>
29. On June 11, 2003, Judge Victor M. Ort of Nassau County Supreme Court granted the motion to vacate Halstead, Kogut, and Restivo's convictions for the rape and murder of Theresa Fusco pursuant to New York Criminal Procedure Law § 440.10(1)(g).<sup>20</sup>

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<sup>19</sup> Ex. H, Uncontested Motion to Vacate Convictions (Bates No. IP1753–56).

<sup>20</sup> Ex. I, Order Granting Uncontested Motion to Vacate Convictions (Bates No. IP1640–41).

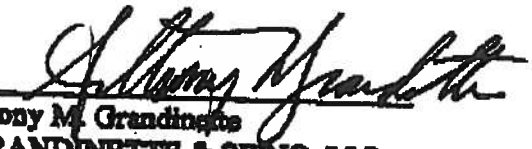


Dated: December 12, 2007  
New York, New York

Respectfully submitted,

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